IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971.

**No. 71-609**

TERMINAL FREIGHT HANDLING CO. AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION,

*Petitioners,*

*vs.*

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.


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## BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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### I.

### INTEREST OF THE AMICUS CURIAE.

This brief is filed on behalf of the Chamber of Commerce of the United States of America, a federation with a membership of over 3,700 state and local chambers of commerce and trade associations, an underlying member-

ship of about 5 million business firms and individuals, and a direct business membership in excess of 32,000.[1]

The instant case raises recurrent and important questions of first impression in an area of vital concern to all employers. Congress has recognized that the secondary boycott is a vicious and devastating economic weapon; it destroys the free flow of commerce and places a neutral employer in jeopardy of losing all or part of his established business.[2] Accordingly, Congress not only outlawed such conduct, but through Section 10(l) of the Act,[3] provided *immediate* relief for the victimized employer. Unlike other provisions of the Act, that Section:

> 1. Commands the Board to give the investigation of secondary boycott charges immediate priority over all other charges; and
>
> 2. Orders the Board's Regional Directors to petition the Federal District Court for temporary injunctive relief, pending final adjudication by the Board, upon a showing of reasonable cause to support such a charge.

Despite such Congressional concern, however, as the court below recognized, Board Regional Directors have failed to seek injunctive relief in three quarters of cases where they have found reasonable cause to believe there has been a secondary boycott.[4] Thus, the issue raised here —whether a Regional Director is *required* by Section 10(l)

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1. This brief is filed with the written consent of all parties hereto pursuant to Supreme Court Rule 42(1).

2. See, e.g., II Legislative History of the Labor-Management Reporting Act of 1959, pp. 989, 1376, 1425, 1446, 1842 (1959).

3. National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 USC § 151, *et seq.* (hereinafter the "Act").

4. See Appendix to Writ of Certiorari (hereinafter referred to as "Appendix"), p. 8, fn. 9.

to seek such injunctive relief—does not merely represent a few isolated cases. Rather, it is typical of a general pattern of studied indifference by the Board to the desire of Congress to provide an immediate effective remedy. And this pervasive failure by the Board only serves to encourage unlawful secondary activity;[5] for the relief provided under § 10(l)—an immediate injunction—is the only effective deterrent against and remedy for this activity.[6]

The decision below sanctions a continuation of the Board's derogation of its statutory role. It grants the Board discretion in an area where such discretion is unwarranted and contrary to the intent of Congress. It dangerously erodes the only effective weapon against the devastating effects of the secondary boycott. Accordingly, a consideration of the issue here presented will not cause the Court's time to be misspent.

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5. Of the total unfair labor practice charges filed against unions in the Board's fiscal year 1969, over 2,100, or 32 per cent, involved alleged violations of § 8(b)(4). This represents an increase of 13 per cent over the § 8(b)(4) charges filed in fiscal year 1968. *Thirty-Fourth Annual Report of the National Labor Relations Board (1969)* p. 13. In addition, more than 50 per cent of the charges involving § 10(l) filed in 1969 were by employers with less than 30 employees. *Thirty-Third Annual Report of the National Labor Relations Board (1968)*, Table 18, pp. 238-239. Thus, it is all the more important that the Chamber present to the Court the consensus of these small employers who do not have the individual resources for such purpose.

6. A § 10(l) injunction is the only remedy which can prevent continuing irreparable harm to a victimized employer; the protection afforded by a permanent post-hearing injunction is illusory. The length of time required for the Board to investigate a secondary boycott charge and issue a complaint, for the trial examiner and the Board to rule on the complaint, and thereafter for a court of appeals to enforce the Board's order, largely negates the value of this proceeding to the afflicted; and perhaps crippled, employer. By the time a permanent injunction is ordered, the employer may be out of business or have been forced to settle the case on an inadequate basis.

For these reasons, the Chamber respectfully requests the Court to consider its views on this issue of serious national concern.[7]

## II.

## REASONS FOR GRANTING THE WRIT.

### A. This Case Represents One Aspect of the Problems Raised in the Administration of Sections 8(b)(4) and 10(l) of the Act.

This case is one among many concerned with the Board's administration of Section 8(b)(4) and 10(l) of the Act; it is representative of a continuing effort through "elucidating litigation" to bring to the attention of the Board, the Board's General Counsel and the Federal courts the problems arising out of the Board's improper administration of § 8(b)(4) and § 10(l). This Court's acceptance of the petitions for certiorari in *Los Angeles Herald Examiner, supra*, and *Sears, Roebuck and Co.* v. *Carpet Layers Local 419, supra*, reveals its awareness of the transcendent importance of Section 10(l) proceedings. The principle underlying the Court's acceptance of these petitions—the full explication of the rights of charging parties—is also equally applicable to the instant case, where the charging party has sought only to obtain the proper statutory remedy.

In view of the recurrent nature of the issues raised here, and of the close relationship of this issue to other signifi-

7. The Chamber previously filed amicus briefs in *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, .... U. S. .... No. 1588 (October Term, 1970); *The Los Angeles Herald Examiner* v. *Kennedy*, .... U. S. .... No. 350 (October Term, 1970); and *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655, dealing with the related question of the rights of a charging party once the Board has initiated a § 10(l) proceeding. The instant case, as discussed *infra*, presents another aspect of this problem.

cant issues respecting charging party rights under Sections 8(b)(4) and 10(l), the Court should grant this petition. The present case also provides the Court with an appropriate vehicle to delineate the role of the Board in this important area of the law.

**B. The Position of Petitioner Is Wholly Consistent with the Interpretation of Section 8(b)(4) and of Section 10(l) Made by This Court in Other Decisions.**

In other decisions involving s 8(b)(4) and s 10(l), this Court has strictly construed the Congressional mandate expressed therein. In *Sears, Roebuck and Co. v. Carpet Layers, Local 419, supra*, this Court held that the provision of § 10(l), directing the Regional Director to apply for a temporary injunction "pending final adjudication of the Board . . ." (emphasis added), did not require that injunctive relief, if granted, "would remain in effect until the Board's order with respect to the underlying unfair labor practice was either enforced or denied enforcement by the court of appeals." 397 U. S. at 198. Strictly construing the language of the Act, this Court held that § 10(l) authorizes an injunction pending only a final adjudication by *the Board*, but not pending review by a court of appeals.

Similarly, in *N. L. R. B. v. Operating Engineers, Local 825 (Burns and Roe, Inc.)*, 400 U. S. 297, 74 LRRM 2129 (1971), this Court strictly interpreted s 8(b)(4) of the Act. There, in reversing the Third Circuit, this Court

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8. The Board's settlements in the 10(l) area are under close scrutiny by the General Counsel and Members of the Board in *Sears, Roebuck and Co. v. Sheetz*, [illegible] and 20472 (8th Cir., Nov. 5, 1971) and as a result of an extensive study undertaken by the General Counsel showing the relationship between § 10(l) decision dates and Board decisions [illegible] in Board fiscal year 1967, as well as other considerations, Board practice in this area. Most § 8(b)(4) cases are settled, but with such minimum sanctions as to be without significant deterrent value. If this case should stand the present [illegible] settlement practice will continue.

held that the "cease doing business" object proscribed under § 8(b)(4)(B) prohibited not only activity directed towards a "termination" of a business relationship, but activity designed to make an employer temporarily "cease doing business" with another employer. In the instant case, as in *Burns and Roe*, a loose interpretation of the Act would only serve to encourage "flagrant secondary conduct with . . . most serious disruptive effects . . ." To hold that such conduct "was not prohibited [or subject to remedy] . . . would be largely to ignore the original Congressional concern." 74 LRRM at 2132. A precise interpretation of the secondary boycott provisions of the Act is required.

**C. The Decision Below by Permitting the Board to Exercise Discretion, Despite the Mandatory "Shall Petition" Language of Section 10(l), Wholly Distorts the Statutory Purpose Underlying 10(l) and Misconstrues the Nature of the 10(l) Remedy.**

The decision below defeats the very purpose of § 10(l): immediate, effective interim relief against a secondary boycott. This Congressional intent is clearly revealed in the Senate Majority Report:[9]

> Section 10(l) makes it mandatory upon the Board to petition for injunctive relief in the case of strikes or boycotts that are alleged to constitute unfair labor practices within the meaning of paragraphs (A), (B) and (C) of Section 8(b)(4). Moreover, cases of this type are to be given priority, and when the board agent charged with the investigation has reasonable cause to believe that the charge is true and that a complaint should be issued, *he is required to petition the district court for appropriate injunctive relief* pending final adjudication by the Board. (Emphasis added.)

Congress obviously believed that secondary boycotts were so devastating in their effect on neutral employers and

9. S. R. No. 105, 80th Cong., 1st Sess. (1947) at 27.

the innocent public alike, that Regional Directors *must be required*, without qualification or limitation, to apply for a § 10(l) injunction upon a finding of reasonable cause. Had Congress intended otherwise, it would have so provided. In Section 10(j) Congress provided, in contrast to the "shall petition" language of § 10(l), that "the Board shall have power . . . to petition."[9] The decision below ignores the careful distinction Congress drew between a mandatory power (§ 10(l)) and a discretionary power (§ 10(j)).[10]

Moreover, the failure of the court below to recognize the clear intent of Congress leads to the following anomalous results:

*First*, Section 10(l) is designed to deter secondary boycotts. However, the Board's failure to seek injunctive relief in at least three-fourths of "reasonable cause" charges filed under Section 8(b)(4) negates the deterrent value of § 10(l). Deterrence results only when the sanction against unlawful activity is immediate. An injunction issued months after the event is no deterrent.

*Second*, while the court below apparently equated the exercise of limited discretion by Regional Directors with a desire to attempt settlement,[11] failure by a Regional Direc-

10. That Congress clearly intended § 10(j) to operate mandatorily is clearly revealed by the fact that in 1959 Congress refused to amend § 10(l) to give Regional Directors discretion to seek an injunction "if under all the circumstances equitable relief is appropriate . . ." (See 105 Cong. Rec. 17881, 86th Cong., 1st Sess. (1959)). Congress' refusal to so amend § 10(l) is further proof, if any is required, that Congress intended the § 10(l) remedy to be mandatory, not discretionary.

11. The court suggested that "We think it is clearly within [the Regional Director's] discretion to make an initial demand upon the union to cease its unlawful activity. However, if he is unable to secure cessation upon such summary demand and negotiation, he must then petition for temporary injunctive relief and issue a complaint (or vice versa)." Appendix, p. 17. In effect, the Board, by exercising discretion, has rewritten the Act. Contrary to the Board's contention, however, discretion ends once a reasonable cause determination has been made.

tor to request a § 10(l) injunction will only frustrate settlement. As any experienced lawyer will testify, the filing of a lawsuit, particularly an injunction action, is one of the most effective means of promoting a rapid settlement of a dispute. And as the court below noted, the Regional Director may still negotiate a settlement after petitioning for § 10(l) relief (Appendix, p. 17).

*Finally*, the Court's conclusion that the phrase "and that a complaint should issue" reflects "Congress' intention that the Regional Director retain limited prosecutorial authority once he has made a reasonable cause determination"[12] is inconsistent with the legislative intent. A finding of "reasonable cause" was contemplated as concurrent with a decision by the Regional Director that "complaint should issue." The finding of "reasonable cause" and the consequent decision to issue complaint are not separate, disjunctive obligations. They are a single, inseparable obligation.

A Regional Director exercises discretion only in deciding whether a charge is based upon reasonable cause. A district court in a § 10(l) proceeding exercises discretion in deciding whether, under normal equitable principles, an injunction should issue. Such exercise of discretion by a Regional Director and a district court fully safeguards the rights of a respondent in a § 8(b)(4) case and belies any claim that the position urged here will result in an inflexible administration of the Act.

12. Appendix, p. 17.

## CONCLUSION.

For the foregoing reasons, the Chamber urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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